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Equinox Holdings, Inc. and Service Employees International Union, Local 87. Case 20–RC–153017

August 26, 2016

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

The Employer’s Request for Review of the Regional Director’s Decision and Certification of Representative is denied as it raises no substantial issues warranting review.¹

¹ We do not rely on *First Student, Inc.*, 359 NLRB No. 120 (2013), cited by the Hearing Officer. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Contrary to the dissent, we find that the Employer has not established that the Regional Director’s decision to overrule its objection to Jared Quarles’ service as the Union’s election observer warrants review. Quarles was terminated shortly before the election, although the Petitioner did not know of that fact until the morning of the election, when it would have been too late to select and train a substitute. In any event, the record is devoid of evidence that Quarles engaged in any misconduct during his service as an election observer; nor has the Employer demonstrated that his participation as an observer prejudiced it. See *Embassy Suites Hotel, Inc.*, 313 NLRB 302, 302 (1993) (“[T]he Board will not find the use of a nonemployee as an observer to be objectionable, absent evidence of misconduct by that observer or of prejudice to another party by the choice of that observer.”); accord *Fleet-Boston Pavilion*, 333 NLRB 655, 656 (2001).

Nor do we agree with the dissent that review is nonetheless warranted because of a purported incident where Quarles allegedly brandished a gun in front of several employees in a lunch room. First, the Regional Director adopted the hearing officer’s finding that this allegation was unsubstantiated: it was based on uncorroborated hearsay testimony of the Employer’s manager. Accordingly, the hearing officer reasonably drew an adverse inference against the Employer for failing to call as witnesses the employees who allegedly observed this incident. Second, although the “gun brandishing” was allegedly reported to the manager by an unnamed employee 4 days before the election, the manager’s uncredited testimony failed to disclose when the alleged incident took place, including whether it even occurred within the critical period leading up to the election. Third, there is no evidence whatsoever, hearsay or otherwise, that the alleged incident, if it even occurred, had anything to do with the union campaign.

The dissent challenges our questioning of whether the “gun brandishing” incident ever occurred, citing in support fn. 5 of the Decision and Certification of Representative. There, the Regional Director, referencing the “alleged” incident, states that “I accept *the finding* that Quarles brandished an imitation gun.” (emphasis added). But the hearing officer, whose finding the Regional Director purports to adopt, made no such finding. The hearing officer merely accepted that Quarles had the imitation gun at work on June 15 based on its discovery that day.

What is known is that, on June 15, the Employer’s manager called the police and reported that Quarles had a gun in his possession. Quarles was briefly handcuffed and detained for possessing a gun, only to be released when the police determined that the “weapon” was not a

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part:

I agree with most of the conclusions reached by my colleagues in this case, who uphold the Regional Director’s Decision and Certification of Representative. Contrary to my colleagues and the Regional Director, however, I would grant the Employer’s Request for Review as to a portion of Employer Objection 2, which alleges it was objectionable for the Union to use terminated employee Jared Quarles as a Union observer in the election held in the Employer’s Pine Street facility.

Quarles brandished a gun at work in the presence of other employees, and he proclaimed that he possessed the weapon “in case any fuckers want to get crazy.”¹

real handgun, but a replica “airsoft” gun. Although the Employer thereafter terminated Quarles, we do not find that the Regional Director erred in finding that the events of June 15 did not render Quarles’ service as an election observer objectionable. As discussed above, Quarles engaged in no misconduct during the election and, except for acting as an observer, he did not serve in any capacity as an agent of the Union; to repeat, there is no evidence linking his possession of the airsoft gun to the Union or the organizing campaign. Cf. *McFarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384, 1392 (1959) (finding that it was not objectionable for an employee, who had threatened another employee with a knife 3 months prior to the election, to serve as an observer for the union where, among other things, the cause of the altercation did not involve the union and the observer held no office in the union).

Although we share our colleague’s concerns regarding violence in the workplace, in this instance we find that the Regional Director did not make a clearly prejudicial error or depart from Board precedent in finding that Quarles’ service as the Union’s election observer would not warrant setting aside the election. See Board’s Rules and Regulations, Sec. 102.67 (c).

¹ Because the Regional Director specifically “accept[ed] the finding that Quarles brandished an imitation gun,” Decision and Certification of Representative at 5 fn. 5, I respectfully disagree with my colleagues insofar as they overrule this objection on the basis that the brandishing incident may not have occurred. While accepting that Quarles brought a gun to the workplace on June 15, 2015, and that the confrontation with the police described herein ensued, also on June 15, the majority posits that the brandishing incident may have occurred on some other date. Assuming arguendo that this is so, then Quarles brought a gun to the workplace more than once, which would only reinforce the conclusion that Objection 2 should be sustained. This is so even if, as the majority further speculates, the brandishing incident predated the criti-

During his last appearance at the workplace—4 days prior to serving as an election observer—the police were summoned regarding his possession of the gun and Quarles was confronted by the police, who led him away in handcuffs in the presence of five or six unit employees. Later, after the police had questioned Quarles and determined that the weapon was an “airsoft” gun,² they escorted Quarles from the facility,³ and his employment was terminated soon thereafter. As one would expect, reports about this incident were disseminated to other employees, including various bargaining-unit employees at the Market Street facility and at least four or five unit employees at the Pine Street facility. Quarles did not return to the workplace until he appeared 4 days later as an election observer for the Union at the Pine Street facility. The Respondent terminated Quarles’ employment prior to the election, but there is no evidence that employee-voters were aware that his employment had been terminated.

My colleagues decline to review the decision of the Regional Director, who concluded that the gun-brandishing incident combined with Quarles’ presence at the election as a union observer did not warrant setting aside the election. The Regional Director reasoned that Quarles’ gun-brandishing in the workplace and his “ambiguous proclamation” (that he possessed the gun “in case any fuckers want to get crazy”) were “wholly unrelated” to the election. Therefore, according to the Regional Director, “[i]t follows that [Quarles’] conduct would not have the tendency to interfere with employee free choice in the election.” As to Quarles’ presence as a union election observer at Pine Street, the Regional Director stated that “[b]y all appearances, Quarles belonged and was welcome there.”⁴ The Regional Director also reasoned that “Quarles’ service as an election observer a

mere 4 days later further demonstrated to employees that his ‘offense’ was not considered serious.” Finally, the Regional Director concluded: “In these circumstances, when notice was short, the election was imminent, and when [Quarles’] asserted ‘offense’ fell far short of its initial appearance, it was not unreasonable or objectionable for the Petitioner to utilize Quarles as its observer” (citations omitted).

Regarding this aspect of the Employer’s Objection 2, I respectfully disagree with my colleagues and the Regional Director. For several reasons, I believe Quarles’ presence as an election observer warrants granting the Employer’s Request for Review and setting aside the election.

First, I believe that brandishing a realistic-looking gun in or near the workplace constitutes extremely serious misconduct. And the notoriety of such an incident is magnified when, understandably, the police are summoned, apprehend and handcuff the employee, lead him away wearing handcuffs in the presence of coworkers, and then escort him out of the facility. An “airsoft” gun is designed to closely resemble a real firearm, and the conduct of the police here demonstrates that they initially believed it was a lethal weapon. Likewise, the Regional Director found that an employee who saw Quarles brandishing the gun “seemingly mistook it” for an actual firearm. Moreover, employees who saw the police leading Quarles away in handcuffs reasonably would have believed the police had determined that the situation was dangerous enough to warrant Quarles’ removal and potential arrest. Although I respect the contrary views of the Regional Director, I do not believe anyone familiar with issues of workplace violence—or who reads the newspaper or watches network news coverage of workplace violence—can reasonably find that anyone believed Quarles’ actions were “not considered serious.”

Second, I believe the Board cannot reasonably conclude that employees’ fears about Quarles’ gun-brandishing would have dissipated either because the police eventually established that Quarles’ weapon was an “airsoft” gun or because Quarles was not wearing handcuffs when he was ultimately removed from the facility by the police. There is no evidence that employees were advised at any time that the gun was non-lethal, nor is it reasonable to conclude that, after employees witnessed the events summarized above, including Quarles being led away by the police in handcuffs, employees’ fears about Quarles would be eased by the fact that Quarles was no longer wearing handcuffs while be-

cal period. See *Dresser Industries*, 242 NLRB 74 (1979) (considering pre-petition conduct that added “meaning and dimension” to post-petition conduct).

² As the Regional Director noted, “airsoft” guns are “replica firearms, or a special type of air guns used in airsoft [a combat-type game], that fire spherical projectiles of many different materials, including (but not limited to) plastic and biodegradable material.” There is a wide range of different airsoft guns, with different types of firing mechanisms, that closely resemble an array of real-life weapons. Airsoft guns are “designed to be non-lethal” while appearing to be a “realistic” version of the weapon they are modeled after. https://en.wikipedia.org/wiki/Airsoft_gun (last visited July 8, 2016).

³ When Quarles was escorted out of the workplace after police questioning, he was not wearing handcuffs, but he remained accompanied by the police.

⁴ Quarles’ employment having been terminated prior to the election, the Employer’s attorney during the pre-election conference challenged Quarles’ presence as an observer for the Union, but the Regional Director attached significance to the lack of evidence that voters were aware of these facts.

ing escorted out of the facility by the police.⁵ I believe at least three uncontroverted facts are material here: (1) a potentially determinative number of employees understood that Quarles brandished a weapon at work and was led away in handcuffs by the police; (2) after police questioning, Quarles was removed from the workplace by the police; and (3) the next time Pine Street employees encountered Quarles was the Board-conducted election held 4 days later, where Quarles was the Union's observer.

Third, contrary to the Regional Director, I do not believe the Board can reasonably find that the above events are "wholly unrelated" to the election. The test for objectionable conduct is not whether particular facts constitute a "worst case scenario" that would have even more clearly interfered with employee free choice.⁶ An election must be set aside when the record establishes that a party's actions "reasonably tended to interfere with employee free choice in the election." *Barton Nelson, Inc.*, 318 NLRB 712 fn. 3 (1995) (citing *House of Raeford Farms*, 308 NLRB 568 (1992), enf. mem. 7 F.3d 223 (4th Cir. 1993)). Even when dealing with the conduct of employees who are not agents of a party (i.e., the company or union), a hallmark characteristic of objectionable conduct is the creation of reasonable fear for one's physical safety or a fear of reprisal for one's sentiments about union representation. *Westwood Horizons Hotel*, 270

⁵ The mere fact that Quarles was not wearing handcuffs when exiting the facility would not necessarily diminish any employee's fears about Quarles' gun-brandishing at work, his statement that he had the gun "in case any fuckers want to get crazy," and his removal from the workplace by the police. Cf. FindLaw, *What Procedures Must the Police Follow While Making an Arrest?* (<http://criminal.findlaw.com/criminal-procedure/what-procedures-must-the-police-follow-while-making-an-arrest.html>) (last viewed July 8, 2016) (rules regarding police custody vary by jurisdiction, but an officer "need not use handcuffs," and an individual is considered to be under arrest when he or she "reasonably believes that [he or] she is not free to leave").

⁶ Clearly, it would have been worse if Quarles brandished a real weapon, proclaimed he would shoot anyone who opposed the Union in the election, and then appeared 4 days later as the Union's election observer. However, that these facts would have been worse does not mean they establish a minimum threshold regarding what constitutes objectionable conduct that warrants setting aside an election.

A separate issue here is whether the Union inappropriately used Quarles as an observer when his employment had been terminated prior to the election. In this regard, the Board's Casehandling Manual states that observers "should be employees of the employer, unless a party's use of an observer who is not a current employee of the employer is reasonable under the circumstances." NLRB Casehandling Manual, Part Two (Representation Proceedings), Sec. 11310.2, para. 2 (citation omitted). Because I would find that the election must be set aside based on Quarles' earlier misconduct and the other events described in the text, I do not reach or pass on the reasonableness of using Quarles as a Union observer when he was no longer an employee (which the Union only learned on the morning of the election).

NLRB 802, 803 (1984).⁷ Contrary to the Regional Director, when a gun-brandishing employee proclaims that he brought the gun to work "in case any fuckers want to get crazy," and is thereafter removed from the workplace by the police (with or without handcuffs), I disagree that employee-voters would reasonably conclude, when they encounter the same person 4 days later as the Union's election observer, that the individual's prior actions must have been "not considered serious."⁸ In this respect, I believe the Regional Director's logic is circular. The question here is whether Quarles' presence as an observer, in light of events 4 days earlier, reasonably tended to interfere with employee free choice by giving rise to reasonable fears about safety or reprisals. When answering this question, it is improper, in my view, to reason that Quarles' participation in the election as an observer must mean employees could not have been threatened or intimidated by his presence. I find similarly unpersuasive, for the same reason, the Regional Director's statement regarding Quarles' role as a Union observer that "[b]y all appearances, Quarles belonged and was welcome there."

There is no evidence that any employees learned that the gun Quarles brandished at work was non-lethal. Consequently, the record establishes that (i) a determinative number of voters at the Pine Street location were familiar with facts giving rise to reasonable fears about their safety based on the presence of Quarles, and (ii) employees would reasonably connect Quarles' unexplained appearance at the election as the Union's observer—4 days after Quarles' removal from the workplace by the police—with his prior misconduct. Here, it is noteworthy that under the Board's election procedures, observers play a significant role. Those procedures, among other things, *require each voter to identify him- or her-*

⁷ When applying the *Westwood Horizons Hotel* standard, I do not believe an election should be set aside only if there is a "general atmosphere of fear and reprisal" (emphasis added) because this may improperly be interpreted to suggest that an election cannot be set aside unless the offending conduct affected nearly all eligible voters, regardless of how close the tally and how serious the misconduct. In fact, the Board has properly set aside elections based on serious misconduct affecting a determinative number of voters. E.g., *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Smithers Tire*, 308 NLRB 72 (1992); *Buedel Food Products Co.*, 300 NLRB 638 (1990); *Steak House Meat Co.*, 206 NLRB 28 (1973).

Because I find Quarles' service as an election observer warrants overturning the election, I find it unnecessary to pass on whether the Regional Director properly denied the Employer's request to reopen the record or for rehearing with respect to its allegation that union observers created the impression of surveillance. I join my colleagues in denying review in other respects.

⁸ As noted previously, the Regional Director found that "Quarles's service as an election observer . . . demonstrated to employees that his [gun-brandishing] 'offense' was not considered serious."

self by name to each observer. According to the Board's Casehandling Manual:

- Observers “represent their principals, carrying out the important functions of challenging voters and generally monitoring the election process.”⁹
- Observers “assist the Board agent in the conduct of the election.”¹⁰
- Observers may be assigned “to act as ushers” who guide voters to the checking table.¹¹
- When voters present themselves at the checking table, the observers are seated there—along with the Board agent—and each voter's name must be checked off by each observer.¹²
- Significantly, every voter receives a ballot *only after each observer is “satisfied as to the voter's identity.”*¹³

The Board in this case is not required to determine the precise point when prior misconduct by a party's election observer may create sufficient concerns about “fear and

reprisal” to warrant setting aside the election. *Westwood Horizons Hotel*, 270 NLRB at 803. Wherever we might draw the line, surely the facts presented here fall on the objectionable side of that line. An election cannot reasonably be upheld where a party's observer brandishes a gun in the workplace, proclaims that he has the gun “in case any fuckers want to get crazy,” is removed from the workplace by the police, terminated, and next reappears in the workplace, 4 days later, presiding over a Board-conducted election as a party's observer, to whom each voter must give his or her name in order to receive a ballot. I agree that our elections should not be lightly set aside, and many cases in this area may present close questions. Unlike my colleagues, however, I do not believe this is one of them.

Accordingly, I agree with otherwise denying review, but as to the above issue, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

⁹ NLRB Casehandling Manual, Part Two (Representation Proceedings), Sec. 11310.3.

¹⁰ *Id.*

¹¹ *Id.*, Sec. 11322.

¹² *Id.*, Sec. 11322.1, paras. 1, 4, 5.

¹³ *Id.*, Sec. 11322.1, para. 4 (emphasis added).